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Supreme Court, U.S.
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No. 95-1720

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GREEN CONSTRUCTION COMPANY AND
THE AMERICAN INSURANCE COMPANY,

Petitioners,

v.

FRED VANKIRK,
WEST VIRGINIA COMMISSIONER OF HIGHWAYS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY BRIEF FOR PETITIONERS

ROBERT S. BRAMS
Counsel of Record

ALLAN A. TUTTLE
G. KENDRICK MACDOWELL
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5650

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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REPLY BRIEF FOR PETITIONERS

Petitioners Green Construction Company and American Insurance Company (collectively, "Petitioners")[1] herein reply to the arguments of Respondent Fred VanKirk, West Virginia Commissioner of Highways ("State") in its Brief in Opposition to the Petition for Writ of Certiorari.

The State's response enhances the case for review by this Court. The central fact that drives this due process petition is undisputed: Petitioners and the State were in direct, intractable conflict, and Petitioners confronted the choice of a binding, prejudicial judgment in their absence, or compulsory intervention. Nothing peculiar to the West Virginia Court of Claims diminishes the constitutional infirmity, or its potential mischief in any state or federal court with an intervention procedure. *See especially* ***Richards v. Jefferson Cty., Ala.***, — U.S. —, 64 U.S.L.W. 4405 (June 10, 1996) (unanimous decision) (reversing judgment of Alabama Supreme Court that had bound parties to prior litigation to which they were neither parties nor privies).

Nowhere does the State dispute:

- the direct conflict of interests between Petitioners and the State that prevented Petitioners from assuming the defense of the State;
- the split among the lower courts over the preclusive effect of vouching;

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[1] Pursuant to Supreme Court Rule 29.6, Petitioners reference the currently accurate corporate information contained in the original Petition for Certiorari at pp. ii - iii.

- the prevalence of vouching; or
- the importance of due process parameters on the vouching procedure.

Instead, the State defends the judgment against Petitioners essentially on two grounds: (1) Petitioners could have intervened (as the West Virginia Supreme Court of Appeals held); and (2) impleader and joinder were not available in the West Virginia Court of Claims. As discussed below, the second argument is both wrong and irrelevant. The first argument begs the basic constitutional question about the proper consequences of declining to intervene.

I. A "Right to Intervene" Is a "Right," Not a Compulsion.

The essential due process question in this petition pertains with equal force to all courts with an intervention procedure: if a party could have intervened, can it be bound by the judgment when its interests were unrepresented and directly adverse to the party asserting res judicata? "Petitioners pose a false dilemma," argues the State, because the "obligations" are really "disjunctive" rather than "conjunctive": Petitioners must either accept the defense *or* intervene. Opp. Cert. at 4. As Petitioners were in undisputed, direct conflict with the State, and thus could not possibly assume the State's defense without sacrificing their own, Petitioners' sole "obligation" was to intervene. All parties thus agree that the issue before this Court is not some curative *right* of intervention, but *compulsory* intervention.

This Court's jurisprudence on compulsory intervention, *e.g., Martin v. Wilks*, 490 U.S. 755 (1989), therefore underscores the importance of reviewing the erroneous judgment below. The State purports to distinguish *Martin v. Wilks* because it concerned a consent decree, but fails to suggest any principled basis for distinguishing its essential holding. Indeed, the different procedural context in *Martin*

actually enhances the importance of its holding to this case. The certworthy reality is this: in a great variety of procedural contexts, "judicial economy" will tempt lower courts to apply some species of "compulsory intervention." This case affords an opportunity to clarify that *Martin*'s essential holding is not limited to consent decrees.

The error in this case is even more fundamental than the error that inspired correction in both *Martin v. Wilks* and the Court's decision last week in *Richards*, — U.S. —, 64 U.S.L.W. 4405. Unlike the erroneously barred litigants in those cases, no one has ever contended—or could contend—that Petitioners interests were "adequately represented" in the adjudication that now binds them. To the contrary, the interests of Petitioners and the State were directly adverse. Where such undisputed conflict infects the prior proceeding, not even the class action mechanism precludes subsequent litigation. *Hansberry v. Lee*, 311 U.S. 32 (1940) (*cited in Richards*, — U.S. —, 64 U.S.L.W. 4405) ("because the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action, the doctrone of representation of absent parties in a class suit could not support the decree").

Indeed, Petitioners' touted "right to intervene" is actually *irreconcilable* with the application of res judicata: if Petitioners "could have intervened," by definition their interests were not adequately represented. W. Va. R. Civ. P. 24(a) (intervention not available if "the applicant's interest is adequately represented"); *cf.* Fed. R. Civ. P. 24(a) (same). If, as all parties concede, Petitioners' interests were not adequately represented, then Petitioners were plainly neither parties nor privies—by *any* definition—in the adjudication that now binds them. As res judicata first requires identity of parties or privies, res judicata should not have barred

Petitioners' day in court on issues that were never fairly adjudicated. *See Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918) (". . . a State . . . cannot, without disregarding the requirements of due process, give a conclusive effect to a prior judgment against one who is neither a party nor a privy with a party therein.") (*quoted in Richards*, — U.S. —, 64 U.S.L.W. 4405 (June 10, 1996)).

II. The Due Process Violation Below Reflects an Abuse of Vouching—*Not* Any Peculiarity in Court of Claims Practice.

The State rests most of its argument and case analysis on the false assertion that the West Virginia Court of Claims lacks any procedure for joinder or impleader, which, even were it true, would not diminish the importance of this Court's review. The State cites no authority (there being none) for its apparently key argument. The State merely observes that there appears to be no rule expressly providing for joinder and impleader—just as there is no rule expressly providing for intervention.

In fact, the West Virginia Court of Claims operates exactly as any other state or federal court for purposes of the issues in this case. As the State itself emphasized in briefing below, the West Virginia Court of Claims Rules of Civil Procedure state that "[t]he Rules of Civil Procedure will apply in the Court of Claims unless the Rules of Practice and Procedure of the Court of Claims are to the contrary." W. Va. R.C.C. 18. The State did not, and cannot, cite any Court of Claims rule that would preclude third-party practice in the Court of Claims.

Indeed, if Court of Claims jurisdiction were so limited that it could not even entertain impleader or joinder—as the State mistakenly suggests—then the Court of Claims would not have had jurisdiction to determine Petitioner's liability *at all.* If the State cannot implead a party that might be

ultimately liable on the claim, then neither can the State determine that party's liability in its absence. In fact, if the State's conclusory suggestion were true, one wonders how the vouching procedure itself could have been available. Moreover, the State does not and cannot explain why intervention would be available, but not impleader. No principled basis for such inherently contradictory limitations exists.

More fundamentally, *it does not matter whether impleader was available below*. The due process violation occurred because the *vouching* procedure was abused. If the West Virginia holding with respect to vouching is allowed to stand, then the due process violation can and likely will be repeated in jurisdictions that permit vouching—regardless of impleader and joinder rules.

Wherever vouching is permitted (49 states and the District of Columbia, including state and federal court and arbitral proceedings), its evident advantages would typically commend it over impleader or joinder. Indeed, what possible incentive would move the State to *implead* Green and American if the State could bind them merely by *inviting* them. More critically, why would any party *ever* implead an *adverse* party if the party could be bound "by invitation only"? While the legal issue in this Petition may be narrowly framed, its implications extend well beyond the borders of West Virginia.

The final refuge for a party seeking to bind a party that was neither party nor privy in the prior proceeding is likewise explained in *Martin v. Wilks*: "where a special remedial scheme exists expressly forclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process." 490 U.S. at 762. The State does not even hint that this case might

concern any such "special remedial scheme." For orderly adjudication of rights to assets of estates, bankruptcy and probate proceedings require some mechanism for preclusion of absent parties. No such special justification exists in this ordinary contract dispute.

Petitioners do not press the outer reaches of due process. It is first and fundamentally the law that a party cannot be bound by a judgment in its absence.[2] It is the State that presses an unprincipled exception: a party *can* be bound by a judgment in its absence—even when it was unrepresented in the proceeding, *and* its interests directly conflicted with the party asserting res judicata. The judgment of the Supreme Court of Appeals of West Virginia perpetuates this unprincipled exception to the core protection of due process.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
Robert S. Brams
Counsel of Record
Allan A. Tuttle
G. Kendrick Macdowell
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington D.C. 20037
(202) 457-5650

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[2] "[I]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party[.]" *Martin*, 490 U.S. at 761; *accord Richards*, — U.S. —, 64 U.S.L.W. 4405 (June 10, 1996).